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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN RICHARD MARTINEZ,

Defendant and Appellant.

D060689

(Super. Ct. No. SCD231663)

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown, Judge. Affirmed in part, reversed in part, and remanded.

A jury convicted John Richard Martinez of two counts of robbery (Pen. Code,¹ § 211). Following the jury verdict, Martinez admitted a serious felony prior conviction (§ 667, subd. (a)(1)); two serious/violent (strike) prior convictions (§ 667, subds. (b)-(i)); and three prison priors (§ 667.5, subd. (b)).

The court denied a defense request to strike the serious/violent felony prior conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

¹ All further statutory references are to the Penal Code unless otherwise specified.

Martinez was sentenced to an indeterminate term of 50 years to life for the two robbery convictions, plus a 12-year determinate term for the serious felony prior conviction and two of the prison priors. The court struck the third prison prior.

Martinez appeals challenging only the sentence imposed. He contends the trial court did not obtain a knowing and voluntary waiver of Martinez's trial rights on the prior convictions and thus he contends the admissions of the priors were invalid. Secondly, he contends the trial court was unaware of its discretion to strike the serious/violent felony prior convictions. We agree that on this record the trial court made no meaningful attempt to obtain a valid waiver of Martinez's trial rights regarding the prior convictions. Accordingly, we will vacate the sentence and the true findings on the prior convictions and remand the case to the trial court for a new sentencing hearing at which the court can undertake further proceedings to determine the truth of the alleged prior convictions and then sentence Martinez accordingly. Because we are vacating the sentence we will not address the contention that the trial court should have stricken one or more of the alleged "strike" priors. We are aware that Judge Brown has retired from the bench and a different judge will conduct the resentencing hearing. We assume that judge will properly apply the law regarding any "*Romero*" motion that might be brought on remand. We express no opinion as to the proper disposition of any such motion.

STATEMENT OF FACTS

Since Martinez does not challenge either the admissibility or sufficiency of the evidence to support his convictions, we will not detail the facts of his offense in this

opinion. It is sufficient to note that Martinez took money from a clerk at a check cashing store and took money from a bank teller using what appeared to be a firearm.

DISCUSSION

This case presents the recurring problem of trial courts that do not take the time to properly inform a defendant of that person's trial rights regarding alleged prior convictions before taking admissions of the truth of such priors. Like many reviewing courts that have addressed this issue, we are frustrated with the failure of courts to take the very few minutes that would be necessary to properly comply with the law and to inform the defendant of the important rights which are waived by the admission. Not only does such judicial neglect fail in its duty to the defendants, but it causes a colossal waste of judicial resources. The requirement for a meaningful admonition to defendants in such cases has existed in California for 38 years. (*In re Yurko* (1974) 10 Cal.3d 857.) Thus, it is not a new or novel concept.

In recognition of those costs presented by the required reversal of true findings, reviewing courts have strained to uphold admissions of prior convictions where, under the totality of the circumstances, it can be established that the defendant's waiver was knowing and voluntary. (*People v. Mosby* (2004) 33 Cal.4th 353, 356 (*Mosby*).) However, even those cases which have upheld admissions in the face of defective admonitions involve cases where the trial judge made some meaningful effort to properly inform the defendant of his or her rights regarding prior convictions. In this case the very experienced trial court did not even try to properly inform Martinez of his rights. Thus we are compelled to vacate the sentence and remand the case for yet another hearing.

The Record

Following the return of the jury verdicts the trial court remanded Martinez without bail and the following discussion occurred:

"THE COURT: Now I'm going to remand Mr. Martinez without bail. [¶] And as far as the strikes are concerned, does he want to admit those? [¶] You have a right to have the D.A. present evidence and have your lawyer look at all the strikes. But are you willing to admit your two strike priors, Mr. Martinez?

"THE DEFENDANT: Yes.

"THE COURT: And the prison prior?

"THE DEFENDANT: Yes.

"THE COURT: So the first prison prior was 12-29-92. It's alleged under 667.5(b) and 668. You admit that 211 prior, right?

"THE DEFENDANT: Yes.

"THE COURT: And the second prison prior was a 4501, bringing substances into prison or jail, in 1994. You admit that second prison prior, right?

"THE DEFENDANT: Yes.

"THE COURT: And then there was a third prison prior for 4573. What was that one?

"MR. VASEL: 4501 is the weapon.

"THE COURT: That's the weapon.

"MR. VASEL: The 4578 is bringing drugs into jail.

"THE COURT: 4573 or 8?

"MR. VASEL: I think it's --

"THE COURT: 4573 it says here.

"MR. VASEL: Yeah.

"THE COURT: So you admit the 4501 in '94 and the 4573, 2007?

"THE DEFENDANT: Yes.

"THE COURT: And then there was -- yeah. The 1994 4501, which is a strike, in CR 18872. You admit that strike?

"THE DEFENDANT: Yes.

"THE COURT: Okay. So you admit two strikes and the prison priors, right?

"MR. VASEL: And the nickel.

"THE COURT: And the nickel prior, too.

"MR. VASEL: The nickel is the 211.

"THE COURT: Right. You admit that robbery?

"THE DEFENDANT: Yes."

Analysis

Before a trial court accepts a defendant's admission of a prior conviction allegation, the court must identify for the defendant the three rights that the defendant is waiving (i.e., to a jury trial, to remain silent, and to confront witnesses), and must obtain waivers of these rights from the defendant. (*Mosby, supra*, 33 Cal.4th at pp. 359-360.) If an express waiver of the rights is not secured from the defendant, reversal is required unless the record as a whole shows the admission was voluntary and intelligent under the totality of circumstances. (*Id.* at pp. 360-361.) The question is whether the defendant's admission was intelligent and voluntary "because it was given with an understanding of

the rights waived." (*Id.* at p.361; see also *People v. Hinton* (2006) 37 Cal.4th 839, 875, fn. 12.)

In *Mosby*, the court found that a defendant's admission of his priors was intelligent and voluntary under the totality of circumstances, notwithstanding the trial court's failure to advise and obtain a waiver of the rights to silence and confrontation of witnesses.

(*Mosby, supra*, 33 Cal.4th at pp. 356, 360, 364-365.) The lynchpin of *Mosby's* conclusion was that the defendant was expressly advised about, and had expressly waived, his right to a jury or court trial on the priors. (*Id.* at p. 364.) The court in *Mosby* reasoned that it was apparent that the defendant knew about and intended to waive the two rights attendant to trial (i.e., silence and witness confrontation) because he had just participated in a trial on the substantive offenses where those very same rights were exercised. (*Id.* at pp. 364-365.) *Mosby* distinguished cases where there was absolutely no advisement and waiver as to the jury or court trial right, or where the trial court's reference to the trial right was fleeting and without response from the defendant so that the circumstances in effect equated to a complete lack of advisement and waiver. (*Id.* at pp. 361-362; *People v. Johnson* (1993) 15 Cal.App.4th 168, 177-178.)

In this case the trial court made no effort to inform Martinez of his rights. The totality of the information provided on this subject is: "You have a right to have the D.A. present evidence and have your lawyer look at all the strikes."

The comment only mentions strikes and totally omits any reference to the serious felony prior conviction (§ 667, subd. (a)(1)) or the three prison priors (§ 667.5, subd. (b)). There is no mention of a jury trial right, and it is difficult to discern if having

the District Attorney present evidence, and defense counsel look at all the strikes, refers to any form of trial. Thus, we cannot find on this record that the defendant's waiver of his trial rights on the prior convictions was intelligent or voluntary.

As a final comment, we are critical of the manner in which this issue was handled because of the extreme importance of a true finding on the prior convictions to the outcome of the case. Without the prior convictions, Martinez was facing a maximum determinate term of approximately six years. The admissions of the prior convictions raised the ante such that he was ultimately given a 62-year-to-life sentence. We recognize that on remand such a sentence may again be possible, and we express no opinion as to the proper sentence on remand. However, whatever sentence may be imposed on remand, at least it will be done in a lawful fashion.

DISPOSITION

The true findings on the prior convictions and the sentence imposed are vacated. The case is remanded to the trial court for further proceedings consistent with the views expressed in this opinion. In all other respects the judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.